Supreme Court, U.S.
FILED
JAN 4 2001
CLERK

Nos. 00-445, 00-632, and 00-633

IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (PROVINCE OF ONTARIO, CANADA) IN OPPOSITION

BRUCE J. TERRIS
KATHLEEN L. MILLIAN *
KEVIN O. LESKE
TERRIS, PRAVLIK & MILLIAN, LLP
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

Counsel for Respondent

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Environmental Protection Agency ("EPA") acted reasonably and in accordance with Section 110(a)(2)(D)(i)(I) of the Clean Air Act when it relied on its general rulemaking authority to consider cost-effectiveness in ascertaining the amount of emissions from upwind states which "contribute significantly" to non-attainment of ozone pollution standards in downwind states.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iv

STATEMENT OF THE CASE 1

1. NOx EMISSIONS FROM THE UNITED STATES CAUSE INCREASED GROUND-LEVEL OZONE IN ONTARIO 1

2. GROUND-LEVEL OZONE HARMS HUMAN HEALTH AND THE ENVIRONMENT IN ONTARIO 3

3. ONTARIO HAS MADE SUBSTANTIAL EFFORTS TO CONTROL ITS OWN NOx EMISSIONS 5

REASONS FOR DENYING THE WRIT 8

THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS DECISION 8

a. The Decision Below Does Not Conflict with This Court's Decision in *Union Electric v. EPA* 9

b. The Decision Below Does Not Conflict with Prior Decisions of the District of Columbia Circuit 12

c. EPA's Rule Does Not Conflict with State Sovereignty or the Act's Statutory Framework of Cooperative Federalism as Interpreted by This Court in *Train v. NRDC* **16**

CONCLUSION **20**

TABLE OF CASES AND AUTHORITIES

CASES: **PAGE**

American Trucking Ass'ns Inc. v. EPA,
175 F.3d 1027 (D.C. Cir. 1999) 12
Chevron USA Inc. v. NRDC,
467 U.S. 837 (1984) 17, 19
Train v. NRDC, 421 U.S. 60 (1975) 18
Lead Industries Ass'n v. EPA,
647 F.2d 1130 (D.C. Cir. 1980) 12, 13, 14, 15
Union Electric v. EPA, 427 U.S. 246 (1976) 9, 10, 11

STATUTES

42 U.S.C. 7409 8
42 U.S.C. 7409(b)(1) 12
42 U.S.C. 7410 ..... *passim*

RULES AND REGULATIONS

62 Fed. Reg. 60,318 (Nov. 7, 1997) 11
63 Fed. Reg. 57,356 (Oct. 27, 1998) ..... *passim*

STATEMENT OF THE CASE

The Province of Ontario will adopt the Statement of the Case in the Brief in Opposition filed by Respondent EPA. In addition, Ontario presents the following supplementary facts.

1. NOx EMISSIONS FROM THE UNITED STATES CAUSE INCREASED GROUND-LEVEL OZONE IN ONTARIO

The NOx SIP Call Rule upheld by the Court of Appeals for the District of Columbia Circuit in this case (63 Fed. Reg. 57,356 (Oct. 27, 1998)) will have the effect of reducing nitrogen oxide ("NOx") emissions and ground-level ozone transported within the United States and, because of prevailing winds, also transported to the United States' neighbor, the Province of Ontario, Canada.

Ontario has the largest population of any of the Canadian provinces, and the majority of the Ontario population is concentrated in the southern part of the Province, in the Great Lakes region. This region receives the most transported NOx and ozone from the United States.

Ontario and the states subject to the NOx SIP Call share a common airshed. The airshed observes no state or international boundaries. The United States contributes 91 percent of the NOx emissions to our common airshed, while Canadian sources contribute only 9 percent. J.A. 2615.

A significant portion of ground-level ozone in Ontario originates from emissions from the United States. The Ozone Transport Assessment Group ("OTAG"), which was composed of the 37 easternmost states, and industry and environmental stakeholders, modeled the transport of air pollution in North

America. OTAG's modeling shows that weather and wind patterns in the ozone season result in NOx emissions and ozone formed in the United States being transported to Ontario. J.A. 2620. In fact, 50 percent or more of Ontario's ozone problem originates in the United States. J.A. 3563.

The only locations in Ontario at which ground-level ozone consistently exceeds the 120 parts per billion level (ppb) (which is the United States one-hour ozone national ambient air quality standard ("NAAQS")), are sites in the southern part of the Province along the Great Lakes.[1/] J.A. 2621. These high ozone levels are caused by transport of ozone and its precursors from the United States across Lake Erie and Lake Huron. *Ibid.* Morever, modeling conducted by the State of Michigan shows that the Toronto/London corridor in Ontario receives significant contributions of ozone and ozone precursors from southeastern Michigan. J.A. 2672.

Ozone problems in Ontario cannot be solved without major reductions in NOx emissions from the United States. Studies by Ontario scientists have shown that NOx and volatile organic compound emissions originating in the United States can, by themselves, cause Ontario's ambient air quality criterion for ozone to be exceeded. Brief of Intervenor Respondent Her Majesty the Queen in Right of Ontario (Province of Ontario, Canada), August 27, 1999, D.C. Cir., Nos. 98-1497, *et al.*, Attachment 1, p. 5. Thus, even if all of Ontario's industries and utilities were not operating and no automobiles were being driven in Ontario, ground level ozone problems in Ontario would still exist because of transboundary pollution from the United States.

[1/] We note that Ontario's own ground-level ozone standard is more stringent at 80 ppb. J.A. 2672.

2. GROUND-LEVEL OZONE HARMS HUMAN HEALTH AND THE ENVIRONMENT IN ONTARIO

NOx emissions harm human health and cause environmental damage. NOx emissions and volatile organic compounds react in the presence of sunlight to form ground-level ozone. 63 Fed. Reg. at 57,359. There does not appear to be a "threshold level" for ground-level ozone below which no health effects are observed. J.A. 3566.

The Ontario Medical Association summarized recent research findings concerning the health effects of ground-level ozone as follows (J.A. 3565):

> In a review of available evidence for the Canadian Smog Advisory Program, two expert panels concluded that health and health-care system effects of ground-level ozone at levels that occur in Canada include lung inflammation, decreased lung function, airway hyper-reactivity, respiratory symptoms, possible increased medication use and physician/emergency room visits among individuals with heart or lung disease, reduced exercise capacity, increased hospital admissions and possible increased mortality. [footnote omitted]

Elevated levels of ground-level ozone, which occur on hot, humid days, are a major ingredient of smog. Ozone in smog has been shown to cause airway inflammation in both healthy individuals, and those who suffer from respiratory ailments such as asthma. J.A. 3553, 3568. Studies have shown that even healthy outdoor workers have a measurable decrease

in lung function when exposed to low levels of ozone. J.A. 3566. In those who suffer from asthma, elevated ozone levels cause increased frequency of asthma attacks, emergency room visits, and hospital admissions. J.A. 3568. A study in Toronto, Ontario, showed that increased ozone levels were associated with increased mortality due to respiratory disease in those who suffer from cardio-respiratory illness. J.A. 3569.

Two independent studies in Ontario show that there is a correlation between elevated ozone levels and hospital admissions for acute respiratory disease. J.A. 3574. Asthma hospital admissions for children on the day after Ontario's ozone levels had exceeded the 80 ppb standard were consistently higher than such admissions on other summer days. *Ibid.*

Children are particularly at risk from ground-level ozone and are, in fact, the largest group sensitive to ozone air pollution. Children tend to be active outdoors in the summer when ground-level ozone levels are highest. J.A. 3570. The breathing pattern of children is different from that of adults, causing them to inhale and retain greater quantities per unit body weight than adults. *Ibid.* Studies, including those conducted in Ontario, show a measurable decrease in lung function of healthy children exposed to ozone. J.A. 3570-3571. "Ozone makes asthmatics more responsive to an allergen." J.A. 3571. Further, a six-year study in Ontario found that 15 percent of summer respiratory hospital admissions for infants were pollutant-associated. J.A. 3574.

Ground-level ozone also damages the environment. EPA has found that ground-level ozone causes "significant agricultural crop yield losses" and visible damage to the foliage of many crops, trees, and ornamental plants. 63 Fed. Reg. at

57,359. Current ambient ground-level ozone levels are causing harm to forests and ecosystems. *Ibid.*

3. ONTARIO HAS MADE SUBSTANTIAL EFFORTS TO CONTROL ITS OWN NOx EMISSIONS

Ontario's air quality standard for ozone is 80 ppb (one-hour average) (J.A. 2672), which is more stringent than the United States' one-hour ozone standard of 120 ppb. In a June 2000 agreement among the federal, provincial, and territorial governments of Canada, Ontario agreed to a Canada-Wide Standard of 65 ppb (eight-hour average) air quality standard for ozone to be achieved by 2010.[2/]

Ontario's emissions of NOx for 1998, the most recent year for which data are available, were less than 1990 levels by 17.4 percent.[3/]

Ontario has also set a goal to reduce projected emissions of NOx by 25 percent from 1990 levels by 2005.[4/] As just stated, by 1998, Ontario had already achieved a 17.4 percent reduction in NOx emissions from 1990 levels. By comparison, Ontario scientists expect the NOx SIP Call Rule to reduce NOx emissions in the covered states by approximately 25 percent on average from 1990 levels by 2007. See 63 Fed. Reg. at 57,450.[5/] Ontario has further pledged to achieve a 45 percent reduction in NOx emissions from 1990 levels by 2015.

[2/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

[3/] See http://www.ene.gov.on.ca/envision/news/factnoxvoc.htm.

[4/] See http://www.ene.gov.on.ca/envision/news/00600MB.html.

[5/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

Under the NOx SIP Call Rule, the states are free to choose their own methods of meeting the requirements of the Rule. See 63 Fed. Reg. at 57,358-57,359. Ontario understands that most NOx emissions reductions in the midwestern states will come from the electrical generating sector.[6/] The average rate of NOx emissions per megawatt hour ("MWH") of electricity produced in 1996 was 2.6 pounds for the northeastern states and 6.6 pounds for the midwestern states. J.A. 2650. Since the record closed below, NOx emissions data for 1998 have become available. The 1998 data show that Ontario's electricity sector emits less than one (1) pound of NOx per megawatt hour of electricity produced.[7/] In 1998, Ontario emitted less NOx per megawatt hour of electricity produced than the States of Michigan (3.85 lbs./MWH), Ohio (4.71 lbs./MWH), Indiana (5.46 lbs./MWH), Illinois (3.43 lbs./MWH), and even New York (1.67 lbs./MWH). In 1998, Ontario emitted less than a pound (0.96 lbs.) of NOx per megawatt hour of electricity produced. *Ibid.*

Ontario's total NOx emissions from electrical generation in 1998 were also significantly less than emissions from the electricity sector in each of the five states just mentioned. In comparison to Ohio, Ontario's NOx emissions are less by a factor of 5.7; in comparison to Michigan, Ontario's emissions are less by a factor of 3.2; in comparison to Indiana, Ontario's emissions are less by a factor of 5.2; in comparison to Illinois, Ontario's emissions are less by a factor

---

[6/]We note that petitioners Appalachian Power Company, *et al.*, are comprised almost exclusively of electrical power companies. See Petition for a Writ of Certiorari, October Term 2000, No. 00-445, "Disclosure Statement," pp. x-xiii.

[7/]See data summarized at http://www.ene.gov.on.ca.envision/news/3charts2.pdf. The website reports emissions in kilograms. One kilogram is approximately 2.2 pounds.

of 3.9; and in comparison to New York, Ontario's emissions are less by a factor of 1.4. *Ibid.*

Thus, the most recent data available show that Ontario's NOx emissions are less than emissions from each of the five states discussed above per megawatt hour of electricity produced and less than the identified states on an absolute basis. Nonetheless, Ontario has also committed to adopt the EPA standards for fossil-fueled electricity generating plants when they are implemented, if their adoption will result in lower emissions in Ontario.[8/]

Since 50 percent of Ontario's ozone originates in the United States, controls on NOx emissions from the midwestern states are critical in order for Ontario to improve its air quality with respect to smog. Thus, Ontario strongly supports EPA's NOx SIP Call Rule, which will result in reduced NOx emissions being transported as NOx and ozone to Ontario, as part of an overall program to reduce ground-level ozone and smog in Ontario.

The control of air pollution emissions in an airshed which extends beyond state and international boundaries poses extremely complex regulatory issues. Ontario had observer status with OTAG, and scientists with Ontario's Ministry of the Environment have analyzed the technical basis of EPA's NOx SIP Call Rule, which was based closely on the work of OTAG. Ontario's scientists have concluded that the Rule is the result of comprehensive scientific analysis of an extremely complex air pollution problem and that it reflects sound policy choices. Ontario submits that the NOx SIP Call Rule will lead to cleaner air in both the United States and Ontario, Canada, and should be allowed to take effect.

[8/]See http://www.ene.gov.on.ca/envision/news/01400mb.html.

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS DECISION

Section 109 of the Clean Air Act requires the Administrator of the Environmental Protection Agency ("EPA") to set National Ambient Air Quality Standards ("NAAQS") for air pollutants in order to protect human health and welfare. 42 U.S.C. 7409. Section 110(a) of the Act provides that, after EPA promulgates these NAAQS, each state is required to prepare a State Implementation Plan ("SIP") which implements the NAAQS. 42 U.S.C. 7410(a). The SIP is reviewed by EPA under Section 110. 42 U.S.C. 7410. Section 110(a)(2) of the Act sets forth criteria that a SIP must satisfy and provides that, if these criteria are met, EPA must approve the proposed plan. 42 U.S.C. 7410(a)(2).

Section 110(k)(5) of the Act provides that, once EPA determines that the "implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport * * * or to otherwise comply with any requirement of this chapter * * *," EPA must issue a rule ("SIP Call") that orders the state to revise and correct its SIP as necessary. 42 U.S.C. 7410(k)(5). Section 307(d) of the Act requires EPA, in issuing a SIP Call under Section 110(k)(5) of the Act, to adhere to its rulemaking procedures, including a formal notice and comment procedure. Section 307(d), 42 U.S.C. 7607(d).

a. The Decision Below Does Not Conflict with This Court's Decision in *Union Electric v. EPA*

In *Union Electric v. EPA*, 427 U.S. 246, 256 (1976), in considering the requirements for SIP's under Section 110(a)(2) of the Clean Air Act, this Court held:

> After surveying the relevant provisions of the Clean Air Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan.

The court of appeals concluded in this case that "[i]n sum, there is nothing in the text, structure, or history of Section 110(a)(2)(D) that bars EPA from considering cost in its application." 213 F.3d at 679. Petitioners Michigan, Alabama, West Virginia, South Carolina, and Virginia (hereafter "Michigan") argue that the decision below conflicts with *Union Electric* because, "in the absence of congressional intent, economic and technological infeasibility shall not be considered by the EPA under section 110(a)(2)." Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-632 (hereafter "Mich. Pet."), p. 14.[2/]

[2/] Michigan is the only petitioner who argues that EPA should be precluded from using cost in Section 110(a)(2). *See* Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-633 of the States of Ohio and Indiana (hereafter "Ohio Pet."), p. 15 ("we argue that considerations of cost-effectiveness should be a secondary factor to * * * air-quality factors under Section 110"); Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-445 of the Appalachian Power Company, *et al.*, p. 12 ("Industry Petitioners do not question that cost is to play a key role in the implementation of the CAA in general and the implementation of the interstate pollutant transport

There is no conflict between *Union Electric* and the decision below.[10/] Michigan incorrectly concludes that "if the EPA was barred from reading cost considerations into the original section 110(a)(2)(E) when approving SIP's, it also must be barred from injecting cost considerations into today's section 110(a)(2)(D)." Mich. Pet. 16. Michigan attempts to extend broadly the *Union Electric* holding to cover any EPA action that relates to Section 110(a)(2) in an attempt to establish a conflict. Michigan's attempt to extend the Court's holding is unpersuasive because both the function that EPA is performing and the issues that are involved in this case are completely different from those in *Union Electric*.

In *Union Electric*, this Court was called upon to examine EPA's approval of a SIP under Section 110(a)(2) of the Act. The Court examined Section 110(a)(2) to decide "whether the operator of a regulated emission source, in a petition for review of an EPA-approved state plan filed after the original 30-day appeal period, can raise the claim that it is economically or technologically infeasible to comply with the plan." 427 U.S. at 249. The Court concluded, based on the "relevant provisions of the Clean Air Act amendments of 1970 and their legislative history," that EPA could not consider claims of economic or technological infeasibility when it reviewed a plan. 427 U.S. at 256. Thus, *Union Electric* addressed only whether a state's SIP met the criteria of Section 110(a)(2).

The present case involves EPA rulemaking under Section 110(k)(5) of the Act, rather than EPA's consideration of a SIP under Section 110(a)(2). Consistent with its

---

provisions in particular").

[10/] Significantly, Michigan did not even rely on *Union Electric* in its opening or reply briefs in the court of appeals.

rulemaking authority, EPA first issued a notice of proposed rulemaking that found that emissions from 22 states and the District of Columbia "significantly contribute" to downwind air pollution problems. 62 Fed. Reg. 60,318 (Nov. 7, 1997). EPA required these states to revise their SIP's to "contain adequate provisions" to prevent the emission of pollutants that contribute significantly to the noncompliance of NAAQS's in other states. *Ibid.* The rule proposed that each state was required to eliminate the NOx emission that could be reduced by highly cost-effective measures. *Ibid.* After an extensive notice and comment period, including the issuance of revised and supplemental public notices, EPA issued the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. As the court of appeals noted, "the fundamental dispute [in this case] is over the clarity of the phrase 'contribute significantly'" in Section 110(a)(2)(D) and how it was defined by EPA in its final rule. 213 F.3d at 679.

Michigan's challenge is not affected by the *Union Electric* holding that EPA cannot consider claims of economic and technological infeasibility when it reviews SIP's. The approval or rejection of SIP's involves an entirely different function and is performed under an entirely different statutory provision than the issuance of a SIP call, such as is involved in this case.

Morever, while EPA considered cost in promulgating the NOx SIP Call Rule, it did not consider any claim of "technological or economic infeasibility." To the contrary, the types of emission control relied upon by EPA in making its determinations in the rule-making were economically and technically feasible. In fact, EPA found them to be "highly cost-effective." 63 Fed. Reg. at 57, 377. Thus, the cost issues in the two cases are entirely different.

b. The Decision Below Does Not Conflict with Prior Decisions of the District of Columbia Circuit

Michigan further asserts that the decision of the Court of Appeals for the District of Columbia Circuit conflicts with its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), and its recent decision in *American Trucking Ass'ns Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Mich. Pet. 19. However, both of those cases involved Section 109 of the Act, not Section 110, which is the section at issue here. The Clean Air Act is a highly complex statute. The fact that in analyzing the statute, the court of appeals concluded that costs may not be considered in setting NAAQS under Section 109, but may be considered in implementing Section 110, creates no conflict among decisions of the Court of Appeals for the District of Columbia Circuit.

In *Lead Industries* and *American Trucking*, which were decided nearly 20 years apart, the court of appeals concluded, based on the plain language of the "statute and its legislative history[,] * * * [that] economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA, supra,* 647 F.2d at 1148; *accord American Trucking Ass'ns Inc. v. EPA, supra,* 175 F.3d at 1040 ("As this court long ago made clear, in setting NAAQS under §109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards" (citing *Lead Industries* and other cases)).

Section 109(b)(1) of the Act, 42 U.S.C. 7409(b)(1), requires EPA to set national ambient air quality standards "which[,] in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite

to protect the public health." That statutory provision is not at issue in this case. Therefore, the court of appeals' conclusions that the statutory language of Section 109, along with its legislative history (*Lead Industries Ass'n v. EPA, supra*, 647 F.2d at 1149-1150), preclude EPA from considering costs in setting NAAQS, is irrelevant to the statutory interpretation of Section 110 of the Act, which is at issue here. Michigan can point to no statutory language or legislative history which would prohibit EPA from considering costs under Section 110(a)(2)(D)(i)(I) of the Act.

In attempting to show a conflict between the decision here and *Lead Industries*, Michigan asserts that, in *Lead Industries*, the court "reviewed Section 110" and stated that, "if Congress had wanted the economics of pollution control considered[,] it would have so provided in Section 110." Mich. Pet. 20, citing *Lead Industries*, 647 F.2d at 1149, n. 37. However, this statement in a footnote does not show any conflict between *Lead Industries* and the decision here.

First, the footnote is dictum. Section 110 of the Clean Air Act was not under consideration by the Court in *Lead Industries*.

Second, even if the footnote were not dictum, taken in context, it does not conflict with the decision below. In relevant part, the footnote states (647 F.2d at 1149, n. 37):

> Similarly, § 110, 42 U.S.C. 7410, provides that once ambient air quality standards have been promulgated, each state must prepare and submit an implementation plan outlining the measures to be taken to ensure that the standards are met. It is these state

> implementation plans which actually impose pollution control requirements and, consequently, if Congress had wanted the economics of pollution control considered it would have so provided in § 110. While states may consider economic and technological feasibility in selecting the mix of control devices, they may do so only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards. Section 110(a)(2), 42 U.S.C. 7410(a)(2). [emphasis added]

Michigan's citation of the footnote from *Lead Industries* omits the last sentence, which is emphasized above. This sentence is obviously critical. The court of appeals explicitly stated that under Section 110, "states may consider economic and technological feasibility in selecting the mix of control devices * * * only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards." 647 F.2d at 1149, n. 37.

In this case, the strict deadlines for attainment of the NAAQS requirement for ozone have not been met. 63 Fed. Reg. at 57,446-57,447 (1998). EPA issued the NOx SIP Call Rule because the states had failed in their existing SIP's to control adequately NOx emissions which prevent attainment of the ozone NAAQS in downwind states. Thus, the very purpose of the NOx SIP Call Rule is to ensure compliance with the ozone NAAQS. Here, EPA's use of cost considerations was not in setting ambient air quality standards, but in determining how the standards will be implemented.

There is nothing in *Lead Industries* to support Michigan's view that, after EPA has identified the states whose NOx emissions are harming other states, EPA may not use cost considerations in setting the level of controls to be applied. EPA has concluded that applying the level of controls called for in the NOx SIP Call Rule will have an "appreciable impact" on downwind nonattainment, and that the required reductions in NOx emissions are not "more than is necessary to ameliorate downwind nonattainment." 63 Fed. Reg. 57, 403, 57,446-57,447 (1998). EPA's actions under Section 110 in this case are therefore consistent with the dictum in *Lead Industries*.

Michigan makes no claim that the *American Trucking* case even discusses Section 110 of the Clean Air Act. Mich. Pet. 19-21. Instead, Michigan alleges that a conflict exists because the court of appeals held that EPA may not consider costs in setting standards to protect public health and welfare under Section 109(d) of the Act in *American Trucking*, but that it may consider costs in the context of Section 110 in this case. Mich. Pet. 19-20. However, as we have seen, in *Lead Industries*, *supra*, 647 F.2d at 1149-1150, which has been consistently followed in the District of Columbia Circuit, the court of appeals based its conclusion that costs may not be considered in setting NAAQS under Section 109 on the statute's plain language and legislative history. Michigan makes no showing that Section 110's plain language and legislative history compel the same result. Therefore, no conflict exists between this case under Section 110 and *Lead Industries* and *American Trucking* under Section 109.

In any event, a conflict of decisions within a Circuit, even if it existed, would be no basis for granting a writ of certiorari. Such conflicts can be corrected by rehearings *en banc* within the Circuit. Petitioners, in fact, asked for rehearing

en banc, but did not rely on the alleged intra-circuit conflict. There is certainly no reason for a writ of certiorari to be granted on this basis.

c. EPA's Rule Does Not Conflict with State Sovereignty or the Act's Statutory Framework of Cooperative Federalism as Interpreted by This Court in *Train v. NRDC*

The Michigan and Ohio petitioners also argue broadly that EPA intruded on state sovereignty and cooperative federalism when it issued the NOx budget program in its Final Rule. Mich. Pet. 22; Ohio Pet. 9.

Michigan and Ohio claim that state sovereignty and cooperative federalism are offended because the NOx SIP Call Rule may cause a state, which contributes less to a particular area's ozone nonattainment than another state, to have to reduce more NOx emissions than the state which has contributed more. Michigan and Ohio use the example that Indiana contributes less than Pennsylvania to New York City's ozone nonattainment. Mich. Pet. 22-23; Ohio Pet. 12-13. Indiana, whose NOx emitters have not applied the same level of pollution control devices to their smokestacks as have Pennsylvania's emitters, will be able to achieve more highly cost-effective reductions in NOx emissions than Pennsylvania. Thus, under the budget set by EPA in the Rule, Indiana will be required to reduce its NOx emissions more than Pennsylvania.

Michigan and Ohio argue that this effect on Indiana offends state sovereignty and the system of cooperative federalism set forth by Congress in the Clean Air Act. Since Pennsylvania contributes more to New York City's nonattainment than does Indiana, Michigan and Ohio argue that

Pennsylvania should be required to reduce its emissions more. Mich. Pet. 24-25; Ohio Pet. 12-13. Michigan bases its argument on Section 110(k)(5) of the Act, 42 U.S.C. 7410(k)(5), which requires that once EPA has concluded that a SIP is inadequate, "the Administrator shall require the State as necessary to correct such inadequacies." Mich. Pet. 24. Michigan asserts that EPA's regulatory choices are "illogical" because, under the budgets set in the NOx SIP Call Rule with respect to New York City, Indiana will be controlling more NOx than is "necessary" and Pennsylvania will be controlling less NOx than is "necessary." *Ibid.*

Although Michigan and Ohio cast their argument as one of state sovereignty and cooperative federalism, it is really an argument concerning the wisdom of EPA's regulatory approach. In addressing the complicated problem of interstate ozone transport, where each state's NOx emissions have effects on the attainment of ozone air quality standards in numerous other states, it was appropriate for EPA to make the determination of the amount of NOx emissions from a state which "contribute significantly" and are necessary to be reduced to correct the inadequacy of the state's SIP. Under *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 845 (1984), the courts may not substitute their judgment for that of the agency, but must determine "whether the Administrator's view that [the regulatory choice] is appropriate in the context of this particular program is a reasonable one." The court of appeals properly concluded here that it had "no basis to upset EPA's judgment." 213 F.3d at 680.

The well-established law concerning the federal-state division of responsibilities under the Clean Air Act shows that EPA has acted fully within that authority in issuing the NOx SIP Call Rule. In *Train v. NRDC*, 421 U.S. 60, 79 (1975), this

Court recognized that EPA is "plainly charged by the Act with responsibility for setting the national ambient air standards," but was "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." The Court further stated that "so long as the ultimate effect of a State's choice of limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Ibid.* This is exactly what EPA has allowed states to do in the NOx SIP Call Rule.

EPA made clear that a state could use any emissions control measure it wanted to achieve the NOx budget requirement. *See* Final Rule, 63 Fed. Reg. at 57,368. Under the budget plan, a state "may choose from a broader menu of cost-effective, reasonable alternatives" including alternatives that "may even be more advantageous in light of local concerns." *Id.*, pp. 57,369-57,370. Furthermore, EPA stated that the states have "full discretion in selecting the controls, so that [the states] may choose any set of controls that would assure achievement of the budget." *Id.*, p. 57, 378. Finally, each state has the option to adopt an interstate trading program that allows it to purchase NOx "allowances" from sources that have elected to over-control, as well as the option, under certain circumstances, of "banking" allowances from prior years so that it can meet emissions limits. *Id.*, p. 57,430. Thus, EPA allowed the states substantial discretion in carrying out their responsibilities under the Act.

Michigan argues in conclusion that certiorari should be granted because, in its view, there are other ways to improve public heath and the nation's air quality than those to be implemented under the NOx SIP Call Rule. Mich. Pet. 28.

Michigan is making a policy argument. This Court has made clear that such arguments must be addressed to Congress or to the agency, and not to the courts (*Chevron v. NRDC, supra,* 467 U.S. at 865):

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. [footnotes omitted]

This is exactly the situation presented here and concerns the same statute the Court considered in *Chevron v. NRDC, supra.* The petitioners have presented no grounds for a grant of certiorari.

* * *

Ontario and the majority of the states subject to the NOx SIP Call Rule share a common airshed. Because of geography, chemistry, and weather, Ontario is directly affected by NOx emissions and ozone transported from the subject states. While no government can change geography, chemistry or weather, governments can work together to reduce emissions of NOx into our common airshed and protect health and the environment. The NOx SIP Call Rule is an important step for such purposes. The Rule reflects sound and sensible policy choices designed to ameliorate a complex air pollution problem. Ontario strongly supports the Rule before this Court.

CONCLUSION

For these reasons, and for those set forth by the other respondents, Ontario respectfully submits that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

BRUCE J. TERRIS
KATHLEEN L. MILLIAN *
KEVIN O. LESKE
TERRIS, PRAVLIK &
MILLIAN, LLP
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

Counsel for Respondent

* *Counsel of Record*

January 4, 2001